

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

FREDERICK MC GRATH,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
DC-1221-97-0930-W-1

DATE: July 21, 1999

John M. DiJoseph, Esquire, Kavrukov, Mehrotra & DiJoseph, L.L.P.,
Arlington, Virginia, for the appellant.

Michael C. Denny, Esquire, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant timely petitions for review of an initial decision that denied corrective action in this individual right of action (IRA) appeal. For the following reasons, we GRANT the petition, VACATE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant is an Attorney-Advisor with the agency's National Guard Bureau (NGB) who filed a timely IRA appeal challenging: (1) The agency's March 17, 1997 action proposing his three-day suspension based on charges of

creating a disturbance and discourtesy on January 16, 1997; (2) the agency's April 23, 1997 issuance of a "highly successful" rather than an "exceptional" performance appraisal for the rating period ending March 31, 1997; and (3) an alleged significant change in his duties, responsibilities, or working conditions. Appeal File (AF), Tab 1; Tab 7, Subtab 4g; and Tab 14, Ex. 144. The proposed three-day suspension was issued by James C. Hise, the appellant's second-level supervisor and Chief Counsel of NGB, who also allegedly significantly changed the appellant's duties and responsibilities. AF, Tab 1; Tab 7, Subtab 4G. Steven B. Rich was the "rater" on the appellant's performance appraisal, while Hise was the "senior rater." AF, Tab 14, Ex. 144.

¶3 The appellant made several disclosures including: A June 28, 1996 memorandum for the NGB Inspector General (IG) accusing Hise, among others, of failing to correct or report an Anti-Deficiency Act (ADA) violation involving the failure to assign only "DERA" duties to an attorney who occupied a "DERA" position, *see* AF, Tab 6, Subtab 15;¹ a June 28, 1996 memorandum for the NGB IG alleging fraud, waste, and abuse relating to an Air Force contract, inappropriate conduct by a member of the "ANG/CEV"² staff relating to a Freedom of Information Act (FOIA) request, and a possible National Environmental Policy Act (NEPA) violation, *see* AF, Tab 14, Ex. 100; a June 28, 1996 report to the Staff Judge Advocate about ADA violations; a July 1996 report to the U.S. Air Force's Office of Special Investigations alleging that an ANG/CEV staff member directed the destruction of documents that had been the subject of a

¹ The term "DERA" appears to be a reference to the provisions at 10 U.S.C. § 2701 et. seq., which establish the "Defense Environmental Restoration Program." *See* 10 U.S.C. § 2701(a)(1); 10 U.S.C. § 2703(b) (funds authorized for deposit in an environmental restoration account may be obligated or expended from the account only in order to carry out the environmental restoration functions of the Secretary of Defense and the Secretaries of the military departments); Hearing Transcript (HT) at 171.

² This acronym apparently refers to the Air National Guard Civil Engineers. HT at 28.

FOIA request, and that two NGB attorneys improperly interfered in the FOIA process with the intent of denying the requester releasable information, *see* AF, Tab 14, Ex. 138; an August 15, 1996 complaint to the General Accounting Office asserting that the NGB Chief Counsel's Office ignored legal opinions documenting NEPA and ADA violations relating to the relocation of an Air National Guard Wing in Georgia, *see id.*; and a March 24, 1997 memorandum for the NGB IG accusing Hise of allowing another employee to use government travel funds for personal reasons, *see* AF, Tab 6, Subtab 14. *See also* AF, Tab 8.

¶4 The administrative judge (AJ) found that the appellant raised these personnel actions and disclosures to the Office of Special Counsel (OSC), and that 120 days had passed since the appellant sought protection from OSC. Initial Decision (ID) at 4. The AJ assumed for purposes of analysis that the appellant's disclosures constituted protected whistleblowing and were a contributing factor in the disputed personnel actions. ID at 5.³ After the hearing, the AJ found that the agency proved by clear and convincing evidence that it would have taken the same actions in the absence of the appellant's alleged protected disclosures.

¶5 On review, the appellant contends that the AJ improperly denied his motion for an order compelling discovery, and did not address relevant evidence supporting his contention that the agency did not prove by clear and convincing evidence that it would have taken the actions in the absence of his disclosures. The agency has timely responded to the petition for review.⁴

³ The AJ determined at the prehearing conference that she would hear testimony on whether the appellant's alleged whistleblowing was a contributing factor in the personnel actions and whether the agency would have taken those actions in the absence of the whistleblowing. AF, Tab 24. The AJ indicated that she would not hear evidence on whether the appellant's disclosures were protected, but would hold a supplemental hearing on that issue if the appellant established that his disclosures were a contributing factor in the disputed actions and the agency did not show by clear and convincing evidence that it would have taken those actions in the absence of the disclosures. *Id.*

⁴ The appellant's motion to strike the agency's response to the petition for review as untimely

ANALYSIS

¶6 The AJ denied the appellant's timely motion to compel discovery "on the basis of relevance, and/or the privileges claimed by the agency in its responses." ID at 1 n.1; AF, Tab 24. The appellant objected to this ruling at the hearing. HT at 9-10. On review, however, the appellant does not contest the AJ's denial of some of his discovery requests based on the deliberative process or attorney-client privilege.⁵ Rather, he contends that his discovery requests meet the definition of relevant evidence set forth in the Federal Rules of Evidence because they seek information that has a tendency to make the existence of facts of consequence to the Board determination more probable or less probable than they would be without the evidence. Petition for Review (PFR) at 3.

¶7 Discovery is the process by which a party may obtain relevant information from another party to an appeal. 5 C.F.R. § 1201.72(a). Relevant information includes "information that appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*; *Beam v. Office of Personnel Management*, 77 M.S.P.R. 49, 57 (1997). What constitutes relevant information in discovery is to be liberally interpreted, and uncertainty should be resolved in favor of the movant absent any undue delay or hardship caused by such request. *Bize v. Department of the Treasury*, 3 M.S.P.R. 155, 164 (1980).

¶8 The appellant requested copies of all agency records involving inquiries or investigations by the NGB, the Air Force, the Department of Defense, U.S. Congressmen and Senators, the Environmental Protection Agency, the State of

filed is denied. Because the deadline for filing a response was a Saturday and the following Monday was a Federal holiday, the agency's filing period included the first workday after that date. 5 C.F.R. § 1201.23.

⁵ We will not, therefore, address those requests on review. *See* 5 C.F.R. § 1201.114(b) (the Board normally will consider only issues raised in a timely filed petition for review or cross petition for review).

Colorado, the Defense Criminal Investigation Service, and the Air Force Office of Special Investigation into alleged wrongdoing by agency officials in the "Redeye Complex," also known as the Colorado Airspace Initiative (CAI). AF, Tab 12 (Requests "k" through "p"). The Redeye Complex and CAI were the subject of the appellant's disclosure of alleged FOIA violations. *See* AF, Tab 14, Ex. 138 (copies of the appellant's disclosures). The appellant also requested copies of all agency records that involved inquiries or investigations by certain entities of: (1) The destruction of records relating to the Redeye Complex by agency officials; (2) the missing appendices from the draft Environmental Assessment in the Redeye Complex; (3) the payment by the agency to the contractor for those missing appendices; (4) violations of NEPA when the NGB moved the Redeye contract to a more costly environmental impact statement without a written NGB legal review; and (5) possible violations of NEPA and the ADA involving the relocation of an Air National Guard Wing in Georgia. *See* AF, Tab 12 (Requests "s," "t," "u," "y," "z," "a.1," "b.1," "c.1," and "d.1"). The appellant further requested copies of all agency records that provided information as to corrective action taken by the agency against NGB officials in response to the alleged violations raised in the disclosures. *Id.* (Requests "r," "w" and "x"). In Request "v," the appellant sought copies of all agency records that involved "meetings with Brig Gen Paul A. Weaver, Jr., Deputy Director, NGB-CF, and other NGB officials including the three meetings the appellant attended to address the missing Redeye Complex draft Environmental Assessment appendices, the contract fraud issues ... and how to respond regarding the missing appendices to the ... FOIA requests." *Id.*

¶9 The Board will not find reversible error in an AJ's discovery rulings absent an abuse of discretion. *Cassel v. Department of Agriculture*, 72 M.S.P.R. 542, 546 (1996). Here, we find that the AJ abused her discretion in denying the appellant's motion to compel the production of the above documents because they all appear

reasonably calculated to lead to the discovery of admissible evidence, i.e., rebuttal evidence that could show a motive to retaliate on the part of the responsible agency officials. *Cf. Beam v. Office of Personnel Management*, 71 M.S.P.R. 629, 632-33 (1996) (the appellant was entitled to responses to interrogatories regarding outside inquiries and meetings about Schedule C conversions because they could lead to admissible, relevant evidence on the issue of whether the Office of Personnel Management was motivated to discriminate against Republican Schedule C appointees seeking conversion). The existence and strength of any motive to retaliate by the agency officials who were involved in the personnel action is a factor in determining whether the agency showed by clear and convincing evidence that it would have taken the same action in the absence of the disclosure. *See Scott v. Department of Justice*, 69 M.S.P.R. 211, 240 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996) (Table).

¶10 We recognize that some of the above-requested records involve investigations by agencies that were not the direct recipients of the disclosures at issue in this appeal. Nevertheless, these documents are still reasonably calculated to lead to the discovery of admissible evidence because the appellant's disclosures may have led to the investigations by other agencies, *see Marano v. Department of Justice*, 2 F.3d 1137, 1140, 1143 (Fed. Cir. 1993) (an employee only needs to show by preponderant evidence that the fact of, or the content of, the protected disclosure was one of the factors that tended to affect in any way the personnel action), or the agency may have perceived that the appellant was a whistleblower as a result of these investigations, *see Juffer v. U.S. Information Agency*, MSPB Docket No. DC-1221-97-1072-W-1, slip op. ¶ 12 (Oct. 2, 1998) (one who is perceived as a whistleblower is entitled to the protections of the Whistleblower Protection Act).

¶11 The appellant also sought records relating to whether the agency took any action in response to alleged misconduct by other individuals who presumably were not whistleblowers. *See AF*, Tab 12 (Requests "s.1" and "y.1"). We find

that the AJ abused her discretion in denying these requests because they appear reasonably calculated to lead to the discovery of admissible evidence relating to whether the agency took similar actions against employees who were not whistleblowers, but who were otherwise similarly situated to the appellant. This is another factor that the Board considers in determining whether the agency has met its clear and convincing evidence burden. *See Scott*, 69 M.S.P.R. at 240.

¶12 Under Requests "g.2," "h.2," and "i.2," the appellant sought copies of agency records not protected by the Privacy Act that: (1) Detailed the professional qualifications of Ms. Sue Ann Jackson for all job positions she occupied during her employment with the NGB; (2) contained the position descriptions and job performance standards for all jobs occupied by Jackson during her employment with the NGB; and (3) contained any information regarding promotions, cash awards, step increases, quality step increases, and any other awards given to Jackson during her employment with the NGB. AF, Tab 12. Under Request "k.3" the appellant sought copies of all agency records not protected by the Privacy Act containing information regarding promotions, cash awards, step increases, quality step increases, and any other awards given to all "NGB-JA" civilian employees other than Jackson and another individual, including those individuals employed as secretaries and attorney-advisors in the NGB-JA, for the time period February 1992 to "the present." *Id.*

¶13 Hise had proposed the appellant's three-day suspension based in part on a charge of discourtesy. AF, Tab 7, Subtab 4g. Under that charge, the agency specified that "[o]n 16 January 1997, and while in the office area where many of the office staff could easily overhear you, you stated in a conversation with Mr. P. Burton Gray, that I had given raises to Ms. Jackson that were so unwarranted that persons in personnel requested that I discontinue the practice. That statement was not only incorrect, but had the effect of harming my reputation and authority to manage the Office of the Chief Counsel" *Id.* The appellant's Requests "g.2,"

“h.2,” and “i.2” all concern Ms. Jackson’s professional qualifications, duties and job performance, as well as the pay and awards she received. Each of these discovery requests appears to seek information that he believes would show that his statements regarding Jackson were correct, and bear directly on the agency’s factual assertion to the contrary in that portion of the charge quoted immediately above. Thus, we find that these requests appear reasonably calculated to lead to the discovery of admissible evidence concerning the disputed correctness of a factual matter relied upon in the agency’s charges, and must be produced. Moreover, such evidence may also bolster the appellant’s argument in rebuttal of the agency’s showing that it would have taken the same personnel action in the absence of whistleblowing activities. *See Scott*, 69 M.S.P.R. at 240. In regard to request “k.3,” the appellant suggests that the documents sought will show that NGB management allowed a hostile work environment to exist in order to “muzzle” him. IAF, Tab 21. We find that the documents concerning promotions and performance awards for NGB employees are not relevant to such a claim, nor does the information sought appear relevant to any of the disclosures or personnel actions at issue in this appeal.

¶14 Under Requests “l.3” and “m.3” the appellant sought copies of all agency records discussing the decision to make Thomas L. Link, Assistant Chief, NGB, the deciding official in the suspension action, and the decision to later replace Link with Major General Russell C. Davis, Vice Chief, NGB, as the deciding official. AF, Tab 12. The appellant apparently seeks to learn whether there was any retaliatory motive to the change, or perhaps whether Link was removed because he did not believe that the three-day suspension should be imposed. We find that this request is reasonably calculated to lead to the discovery of admissible evidence, i.e., evidence that demonstrates a motive to retaliate and/or demonstrates that the agency’s evidence in support of its action is not strong because a senior agency official either believed that the appellant did not commit

the alleged misconduct or believed that the penalty should be mitigated.

¶15 The appellant requested copies of all agency records that are in the NGB Administrative Services and Acquisition files of the FOIA requests filed by Michael Ponto requesting information about the Redeye Complex and the CAI. AF, Tab 12 (Request "q"). He also requested copies of all agency records consisting of legal opinions written by Major Donald G. McKinney, former Environmental Attorney employed by NGB-JA, dealing with certain alleged violations of the NEPA and ADA that were also raised in the appellant's disclosures. *Id.* (Request "e.1"). We find that these requests appear reasonably calculated to lead to the discovery of admissible evidence with respect to the reasonableness of the appellant's belief that his disclosures evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *See* 5 U.S.C. § 2302(b)(8)(A); *cf. LaChance v. White*, No. 98-3249, slip op. at 5 (Fed. Cir. May 14, 1999) (a showing that an employee was familiar with the alleged improper activities and that his belief was shared by other similarly situated employees "may be of some relevance" in determining whether his belief was reasonable). As noted previously, *see* fn. 3 above, the AJ did not hear evidence on whether the appellant's disclosures were protected, but instead decided to hold a supplemental hearing on that issue if the appellant established that his disclosures were a contributing factor in the disputed actions and the agency did not show by clear and convincing evidence that it would have taken those actions in the absence of the disclosures. *See* ID at 1, n. 1. Because the issue of the protected status of the disclosures was not reached below, it is premature to determine whether Requests "q" and "e.1" are relevant. That decision should properly be made at an appropriate time by the AJ on remand, in the event that a determination of protected nature of the disclosures becomes necessary to the disposition of this appeal.

¶16 The appellant requested the production of NGB IG and Judge Advocate records dealing with the location of "National Guard soldier dormitories in a floodplain in a mid-western state and the use of training classrooms for National Guard members that were previously used as a training area for the shooting of weapons," including all IG records regarding discussions with the appellant about the fact that other employees "failed to issue Major McKinney's legal opinion to NGB-IG for an unreasonable amount of time thereby endangering the lives and health of National Guard members at that facility." AF, Tab 12 (Request "f.1"). The appellant also requested the production of copies of all agency records not protected by the Privacy Act that detail the professional qualifications of Sarah Titus for all job positions that she occupied during her employment with the NGB Judge Advocate, that contain the position descriptions and job performance standards for all jobs occupied by Titus, and that contain any information regarding promotions, cash awards, step increases, quality step increases, and any other awards. *Id.* (Request "j.2"). The appellant has not explained how these documents appear reasonably calculated to lead to the discovery of admissible evidence, *see* AF, Tabs 15 and 21, and we discern no connection between the documents sought and the disclosures and personnel actions at issue in this appeal. Thus, the appellant's motion to compel the production of Requests "f.1" and "j.2" is denied. *Carter v. Department of Labor*, 29 M.S.P.R. 500, 502 (1985) (the appellant was not entitled to have the agency produce documents absent a showing as to how such information was relevant to specific issues in her case).

¶17 Similarly, we find that Requests "d.2," "e.2," and "f.2" do not appear reasonably calculated to lead to the discovery of admissible evidence. The appellant sought all agency records not protected by the Privacy Act that involve complaints, grievances, or equal employment opportunity complaints and the settlement of such complaints, grievances, or EEO complaints filed by Ms. R. Sendek, an Environmental Attorney, relating to the selection by Hise of Mr. P.

Burton Gray as Acting Assistant Counsel, Environmental Law. AF, Tab 12 (Request "d.2"). The appellant requested all agency records not protected by the Privacy Act detailing the professional qualifications of Sendek and Gray for their attorney-advisor positions. *Id.* (Requests "e.2" and "f.2"). The appellant has not explained how these requests appear reasonably calculated to lead to the discovery of admissible evidence. We deny these requests because the matters described therein have no apparent connection to the disclosures and personnel actions at issue in this appeal. *See Carter*, 29 M.S.P.R. at 502.

¶18 The agency has not alleged that production of any of the requested documents would cause any undue delay or hardship, and it appears that the agency had a full and fair opportunity to assert those bases for resisting discovery. *See* AF, Tab 19 (Response to Appellant's Motion to Compel); PFR File, Tab 3 (Agency's Response to Petition for Review). Accordingly, absent any basis for denying them, we order the agency to produce the following documents on remand: Requests "k," "l," "m," "n," "o," "p," "r," "s," "t," "u," "v," "w," "x," "y," "z," "a.1," "b.1," "c.1," "d.1," "s.1," "y.1," "g.2," "h.2," "i.2," "l.3," and "m.3."

¶19 The appellant claims on review that the agency's evidence in support of its proposed three-day suspension is not strong because the agency relied on biased witnesses in proposing the action and did not interview other witnesses who downplayed the incident. PFR at 8-11. The appellant also contends that another supervisor decided not to propose any action against the appellant because he viewed the incident as insignificant. PFR at 9. The appellant further contends that the agency did not take similar personnel actions against employees who were not whistleblowers, citing among other things the "Fred briefings" given to new employees that allegedly denigrated the appellant, and an incident of which Hise was aware in which an employee allegedly told the appellant that he was a "fucking liar" and a "fucking back-stabber." PFR at 9-11, 15. Moreover, the appellant asserts that other employees feared reprisal by Hise, and that Hise was

evasive during his testimony. *See* PFR at 13, 18. The initial decision does not adequately address these arguments, or address the existence and strength of any motive to retaliate against the appellant. *See Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 587 (1980). As set forth above, the appellant's discovery requests might lead to relevant information regarding any motive to retaliate, whether the agency took similar actions against non-whistleblowers, and the strength of the agency's evidence in support of any personnel actions.

¶20 Thus, after the completion of discovery on remand, the AJ shall afford the appellant an opportunity to submit admissible, discovered evidence into the record. The AJ shall also afford the appellant a hearing, if requested by him, at which the parties may examine witnesses, including new witnesses uncovered through the discovery process, with respect to such newly discovered admissible evidence. The AJ shall hear any other evidence, including evidence pertaining to whether the appellant's disclosures were protected, that she determines is necessary for the disposition of this appeal. *See supra*, n.3. The AJ shall then issue a new initial decision that incorporates any new evidence and testimony submitted on remand and addresses the factors set forth in *Scott*, as applied to the facts in this case and the arguments raised by the appellant.

ORDER

¶20 Accordingly, we VACATE the initial decision and REMAND this appeal for adjudication consistent with the Opinion and Order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.